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FACEBOOK, INC.

12  
13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN JOSE DIVISION**  
16

17 FACEBOOK, INC., a Delaware  
18 corporation,

19 Plaintiff,

20 v.

21 JOHN DOES 1-10, individuals; and JOHN  
DOES 11-20, corporations,

22 Defendants.

Case No. C-07-03404 HRL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR LEAVE TO TAKE  
FURTHER DISCOVERY, TO ISSUE  
LETTERS ROGATORY, AND TO  
CONTINUE CASE MANAGEMENT  
CONFERENCE**

23 Date: October 23, 2007  
24 Time: 10:00 a.m.  
25 Dept.: 2, 5th Floor  
26 Before: Honorable Howard R. Lloyd  
27  
28

MEMORANDUM OF POINTS AND AUTHORITIES  
ISO MOTION FOR LEAVE TO TAKE DISCOVERY

91004-1100/LEGAL13565062.1

CASE NO. C-07-03404 HRL

## I. INTRODUCTION

FACEBOOK INC. ("Facebook") moves this Court for an order allowing it to obtain discovery from third-party Internet Service Providers ("ISPs"), including Look Communications Inc. ("Look") and Rogers Cable Communications Inc. ("Rogers"), in order to obtain information regarding the identity of the persons responsible for the unauthorized access of Facebook's computer system. At least between June 1, 2007 and June 15, 2007, John Does 1-10 or John Does 11-20, used an Internet Protocol Addresses ("IP addresses") registered to Accretive Technology Group, Inc. ("Accretive") to access without authorization, or in excess of authorization, Facebook's proprietary computer system more than 200,000 separate times.

On July 13, 2007, the Court granted Facebook's *Ex Parte* Motion, in part, for leave to take discovery on Accretive Technology Group, Inc. ("Accretive"), based on Facebook's good faith belief that Accretive had data in its possession revealing the identity of the person or entity behind these unlawful attempts. Through server logs that Accretive provided in response to Facebook's subpoena, Facebook determined that the commands to attack Facebook's Web site were sent to Accretive's server by IP addresses 74.117.158.224 and 207.136.118.110, which belong to subscribers of Look and Rogers facilities in Toronto, Canada. Because the ISPs in Canada likely possess information that will reveal the identity of the individuals responsible for the attacks, Facebook requests that it be permitted to conduct discovery on Look, Rogers, and other identified ISPs regarding users and/or subscribers of IP addresses used in furtherance of the unauthorized access of Facebook's protected computers.

## I. STATEMENT OF FACTS

On June 28, 2007, Facebook filed its complaint against John Does 1-10 and John Does 11-20 ("John Doe"). Facebook alleges that between or before June 1 and June 15, 2007, John Doe accessed without authorization, or in excess of their authorization, Facebook's proprietary computer system at <http://www.facebook.com> more than 200,000 times from a single IP address in violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 and the California Comprehensive Data Access and Fraud Act, Cal. Penal Code § 502(c). Each and every

1 communication on the Internet is associated with a unique IP address that identifies the computer  
2 sending the communication as well as a unique IP address that identifies the intended recipient of  
3 the communication. Facebook initially used publicly available Internet resources and tools to  
4 determine that Accretive was the assigned owner of the IP address from which the access  
5 emanated.

6 On July 13, 2007, the Court granted Facebook's *Ex Parte* Motion, in part, for leave to take  
7 discovery on Accretive, based on Facebook's good faith belief that Accretive had data in its  
8 possession revealing the identity of the person or entity behind these unlawful attempts.  
9 Subsequently, Facebook served a subpoena on Accretive, pursuant to Rule 45 of the Federal  
10 Rules of Civil Procedure. In response to this subpoena, and after discussions with Facebook's  
11 counsel, Accretive provided a hosting agreement indicating that the IP address at issue was  
12 subleased to "1564476 Ontario Limited," an entity in Canada that is affiliated with an online adult  
13 entertainment company doing business at [www.slickcash.com](http://www.slickcash.com). Accretive also produced server  
14 logs from the server bearing the IP address that was used to attack Facebook's site. This  
15 information indicated that the commands to gain unauthorized access and launch malicious code  
16 on Facebook's site were sent to that server by IP addresses 74.117.158.224 and 207.136.118.110,  
17 which Facebook determined are registered to Look and Rogers. Facebook believes that the  
18 subscribers or users of these two IP addresses are responsible for attacking its Web site. On  
19 September 6, 2007, Facebook sent preservation letters to Look and Rogers requesting that they  
20 preserve all logs, records, data, and other information relating to these IP addresses. Declaration  
21 of Joseph Cutler ("Cutler Decl.") ¶¶ 2-3; Exhs. A and B. Both Look and Rogers responded that  
22 they had preserved the subscriber information for the IP addresses, but that they required a court  
23 order, from a Canadian Court, via letters rogatory, in order to release the requested information.  
24 Cutler Decl. ¶ 4. Apart from the information on Look's and Rogers' servers, Facebook does not  
25 have any other reasonable means to learn the identities of the subscribers using these IP  
26 addresses. Cutler Decl. ¶ 7. Facebook has good cause to proceed with its discovery on Rogers  
27

1 and Look, pursuant to Rule 26(d), since its case will not proceed without the information  
2 currently in Rogers' and Look's possession. Cutler Decl. ¶ 7.

3 Based on the information contained in Accretive's server logs, Facebook believes that the  
4 Look and Rogers subscribers are responsible for directing the attacks on Facebook's site and are  
5 therefore at least some of the John Does referred to in Facebook's complaint. Facebook has no  
6 reasonable means to identify these John Does without access to the information in Look's and  
7 Rogers' possession as well as access to the information contained on the subject server.

## 8 II. ARGUMENT

9 There is good cause for the Court to authorize discovery from both Look and Rogers  
10 including the release of the information described in Attachments A of the letters rogatory  
11 attached to the Cutler Declaration. Cutler Decl. ¶¶ 5-6, Exhs. D and E. Facebook has grounds to  
12 proceed with its suit against the John Does, but in order to do so Facebook must first learn the  
13 John Does' identities. Facebook has no reasonable means available to identify the John Does  
14 other than from logs residing on the servers, or from information held by, Look and Rogers.

15 To the extent leave of Court is needed under Federal Rule of Civil Procedure 26(d) to take  
16 discovery before an initial discovery conference pursuant to Federal Rule of Civil Procedure 26,  
17 including serving the letters rogatory, such leave should be granted. No parties have yet been  
18 named so it would be impossible to hold a conference of counsel under Rule 26(f). Unless  
19 discovery is allowed to determine defendants' identities, this matter could never proceed.

## 20 III. REQUEST FOR ISSUANCE OF LETTERS ROGATORY

21 Because neither Look nor Rogers can produce the information sought in this discovery  
22 request without an order from a court of competent jurisdiction in Canada, Facebook petitions the  
23 Court to issue Letters Rogatory pursuant to 28 U.S.C. § 1781, in the forms attached to the Cutler  
24 declaration, requesting that the appropriate judicial authority of Ontario, Canada compel the  
25 production of documents and information specified in the Letters Rogatory relating to the identity  
26 of, and contact information for, customers of Look Communications and Rogers  
27 Communications. Cutler Decl. Exhs. D and E. Specifically, the letters rogatory request the

1 identity of users of the two IP Addresses that were used to send commands through Accretive's  
2 server in the United States to stage malicious attacks on Facebook's Web site. Id.

3 Facebook requests that this Court issue the proposed Letter Rogatories, two copies of each  
4 of which are attached, and that the Clerk of the Court affix the seal of this Court and return one  
5 original to counsel for Facebook, who shall be responsible for attaching true and accurate copies  
6 of the summons, complaint and exhibits in this action, and delivering the foregoing to the  
7 appropriate judicial authority in Ontario, Canada. Facebook shall be responsible for payment of  
8 all charges and expenses associated with service of the Letter Rogatory and will prepay them, if  
9 necessary. Otherwise, Facebook shall reimburse this Court for any charges or expenses due to the  
10 appropriate judicial authority of Ontario.

#### 11 **IV. REQUEST FOR CONTINUANCE OF CASE MANAGEMENT CONFERENCE**

12 In addition, Facebook requests a twelve (12) week continuance of the initial case  
13 management conference in this case, currently scheduled for October 2, 2007, to enable Facebook  
14 to conduct discovery on Look and Rogers by issuing letters rogatory to the Ontario courts, and to  
15 file and serve an amended complaint, naming the Doe defendants. Facebook understands that it  
16 often takes about a month for a Canadian court to issue a subpoena in response to a letter  
17 rogatory. Cutler Decl. ¶ 8. After the order is issued by the Canadian court, it will take Rogers  
18 and Look some time to provide Facebook the requested information. Cutler Decl. ¶ 9. Facebook  
19 will take prompt action. Cutler Decl. ¶ 10. Should Facebook receive inconclusive evidence such  
20 as it obtained from Accretive, additional discovery may be necessary. Otherwise, Facebook will  
21 promptly amend its complaint to substitute the names of the identified John Does and endeavor to  
22 serve them. Cutler Decl. ¶ 10. As a result, despite Facebook's diligent efforts to identify  
23 defendants to date, it anticipates that it will need an additional seven weeks after this court  
24 authorizes the discovery requested in this motion in order to identify and serve John Doe  
25 defendants. Cutler Decl. ¶ 8. Once properly served with the complaint, pursuant to  
26 Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure, defendants have twenty (20) days to  
27 file a response. Therefore, additional time will be required before defendants can reasonably be

